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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1247

SYLVESTER K. STEVENS, Petitioner,

v.

HELEN C. FRICK, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a writ of certiorari be granted in a case which seeks to enjoin proceedings between two private citizens in a Pennsylvania court where there neither has been nor can be any deprivation of the petitioner's rights by the Pennsylvania court?

2. Should a writ of certiorari be granted in a case which seeks to enjoin proceedings between two private citizens in a Pennsylvania court where the same constitutional questions petitioner seeks to raise in the federal courts are now pending before the Pennsylvania court?

3. Should a writ of certiorari be granted in a case which seeks under the Civil Rights Act of 1871 to enjoin a Pennsylvania court where there has been no state action?

STATEMENT OF THE CASE

Since January, 1965, a non-jury action has been pending in the Court of Common Pleas of Cumberland County, Pennsylvania between two private residents of Pennsylvania. One of the questions in that suit is whether certain statements made by the defendant in that case, who is the petitioner here, are false, defamatory, and malicious. The defendant there asserted that the statements were true and also argued that, even if his statements are false, defamatory, and malicious, the action contravenes the First and Fourteenth Amendments to the United States Constitution. All of the testimony has been taken, the evidence ruled upon, the parties have submitted their respective requests for findings of fact and conclusions of law, argument thereon has been had, and the sole matter remaining is the decision of the Judge. The defendant by this proceeding is asking this Court to halt the Pennsylvania action (Petition, p. 8)*

Respondent, Miss Helen C. Frick, is a resident of Allegheny County, Pennsylvania, and petitioner, Sylvester K. Stevens, is a resident of Cumberland County, Pennsylvania (15a). In December, 1964, he published a book written by him entitled "Pennsylvania—Birthplace of a Nation", and had it sold and circulated throughout Pennsylvania and elsewhere (13a). The book contained statements about Henry Clay Frick, late father of Miss Frick (17a-18a).

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*All record references in the form of page numbers followed by "a" are to the Court of Appeals Appendix. Those references to the Petition for Writ of Certiorari are "Petition, p. . . ."

Statement of the Case.

On January 19, 1965, Miss Frick commenced an action in equity against petitioner in the Court of Common Pleas of Cumberland County, Pennsylvania (13a). In this action she alleged that the statements about her father were false, defamatory, malicious, and hence libelous (17a-19a). She further alleged that she had devoted her life to honoring the memory of her father, so that she had become specially associated with the memory of her father in the mind of the public, and that the libelous statements against her father thus tended to lower her in the mind of the community (16a). Because of these facts, she alleged that she in her own right had been injured by the libelous statements in that she had unjustly suffered a loss of reputation and public esteem (19a). If the Pennsylvania court finds that the statements are false and defamatory, Miss Frick has requested that repetition of them be restrained by enjoining further distribution of the book or that the Court grant such other relief as may be deemed necessary and proper (20a).

On February 25, 1965, petitioner filed an answer in which he admitted publishing the statements, but claimed that the statements were true (24a). In addition, petitioner has raised in the Pennsylvania case the same constitutional questions which are raised in this proceeding (25a), Petition, p. 10.

After pre-trial discovery by both parties, a pre-trial conference was held on June 11, 1965, at which petitioner agreed that certain statements in his book were erroneous and agreed to retract them (24a). The case then proceeded to trial on the truth or falsity of the other challenged statements and testimony was taken at

Carlisle, Pennsylvania, before Hon. Clinton R. Weidner, Judge of the Court of Common Pleas of Cumberland County, on six days during June, August and November, 1965 (24a).

On March 1, 1966, the Pennsylvania Court received briefs and heard oral argument relating to the admissibility of certain evidence (25a). On July 13, 1966, the Court issued its ruling on these evidentiary matters (25a).

On October 12, 1966, petitioner filed in the Pennsylvania Court requests for findings of fact and conclusions of law, together with a brief. He devoted 40 pages to arguments on his alleged constitutional right to publish false and defamatory statements, and 109 pages to arguments that the statements were not false and defamatory.

On January 10, 1967, the Pennsylvania Court heard oral argument on the requested findings of fact and conclusions of law, at which time petitioner's attorney argued the same constitutional questions presented in this proceeding. The matter is now under consideration and the only thing remaining in the Pennsylvania action is the Judge's decision.

Since the Pennsylvania suit was instituted, petitioner not only has continued to sell his book with 10,000 copies in circulation and an additional 4000 more available, but a new paperback edition has been prepared and distributed by him, with 1000 copies of the new paperback in circulation and some 2000 available to fill expected orders. (39a)

Statement of the Case.

On July 26, 1966, about 18 months after the Pennsylvania suit had been instituted and seven months after all testimony had been taken, petitioner filed the complaint in this action against Miss Frick in the Southern District of New York, seeking to enjoin her from further prosecution of the Pennsylvania action (1a). He asserted that the Pennsylvania proceeding violated his rights under the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983, (13a). On August 12, 1966, Miss Frick moved to dismiss this action. Petitioner cross-moved for a preliminary injunction (28a). The District Court on October 17, 1966, granted the motion to dismiss and denied the motion for an injunction: 259 F. Supp. 654. This decision was affirmed by the Court of Appeals for the Second Circuit on February 1, 1967: 372 F.2d 378. Petitioner filed his petition for review on April 10, 1967.

ARGUMENT

I. Petitioner's Rights Have Not Been Affected In Any Way By The Pennsylvania Action.

Contrary to petitioner's assertion that his "sensitive First Amendment" rights are being put in jeopardy and their exercise immediately obstructed by a state court," (Petition, p. 6), petitioner's rights have not been affected in any way by the Pennsylvania action. During the time that suit has been pending, petitioner has continued to distribute and sell his book. In addition, he has even printed, distributed and sold a new paperback edition (39a). There has been no deprivation of any of petitioner's rights. The Circuit Court held (Petition, p. 32):

> ". . . There is no evidence of any interference with Stevens' rights, with the distribution of his book or with the public's right to read."

The District Court held:

> "As indicated heretofore, the 'mere pendency' of the Pennsylvania action has not demonstrably impaired Dr. Stevens' constitutional rights, the sale of his book or the public's right to read." (11a)

Petitioner's unsupported assertion that his rights are being affected cannot survive the "concurrent findings of fact" by two courts below: *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

II. Federal Courts Should Not Interfere With State Court Proceedings Unless It Is Clear That The State Courts Will Disregard The Constitution.

The most compelling reason for denying the petition is the fact that the very same constitutional questions are now pending before the Pennsylvania Court. This Court has very recently held "that the state courts should have the opportunity to decide in the first instance is a course consistent with comity": *Giles v. Maryland,* 35LW4181, 4185. The same case reiterated the long-established rule that "in the light of the relations existing . . . between the judicial tribunals of the Union and States . . . that those relations not be disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

This principle is particularly applicable since petitioner has not demonstrated that "the state trial court will find the defendant guilty if he is innocent": *Greenwood v. Peacock,* 384 U.S. 808, 827. Petitioner is asking this Court to engage in "the unseemly process of prejudging their brethren of the state courts." *Georgia v. Rachel,* 384 U.S. 780, 803. This Court should not be asked to do so. Surely, if "[T]he civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial," an original action under the Civil Rights Act cannot do so when there is no evidence that the state court will not protect those rights. See, *Greenwood v. Peacock,* 384, U.S. 808, 828. The Civil Rights Act was never intended "to work a wholesale disloca-

tion of the historic relationship between the state and federal courts" in the administration of civil or criminal cases. Ibid, p. 831.

The question here is not the protection of First Amendment rights because there has been no interference with those rights. On the contrary, the question is whether in the absence of the slightest evidence that a state court will disregard the United States Constitution or that it will endeavor to enforce a law which on its face is clearly illegal, such as in *Georgia v. Rachel,* 384 U.S. 780, 803, and *Dombrowski v. Pfister,* 380 U.S. 479, this Court or any federal court should disrupt the delicate balance between federal and state courts by removing from the state court its right to determine constitutional issues arising in a suit between private parties.

Georgia v. Rachel, 384 U.S. 780, 800, rules that the federal courts are to supersede state tribunals "only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." Of course, in the Pennsylvania action the respondent denies that petitioner has any federal rights which might be infringed. But if petitioner does there have the federal rights he claims, there is no reason to believe that the Pennsylvania courts will disregard those rights. Certainly, Pennsylvania has no "law of general application" to stand in his way.

III. Petitioner's Arguments Answered.

Petitioner's arguments are enumerated A through D and the following are specific replies thereto.

A. THE PETITION SHOULD BE DENIED UNDER 28 U.S.C. § 2283 AND ALSO BECAUSE OF THE LONG-STANDING POLICY THAT A FEDERAL COURT WILL NOT ENJOIN STATE COURT PROCEEDINGS INVOLVING PRIVATE CITIZENS.

Petitioner argues that 28 U.S.C. § 2283 is not a bar to his federal court proceedings. (Petition, p. 16) However, this Court in *Clothing Workers v. Richman Bros.*, 348 U.S. 511, held (pp. 514, 516):

> "We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. See, *Toucey v. New York Life Ins. Co.*, 314 U.S. 118. By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."
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> * * * * * * *
>
> ". . . This (28 U.S.C. § 2283) is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically denied exceptions."

If, as petitioner asserts, a federal court can enjoin state proceedings as a matter of judicial discretion, then there would have been no need to remand to the

district court in *Cameron v. Johnson,* 381 U.S. 741, to have it "consider whether 28 U.S.C. § 2283 bars a federal injunction in this case," i.e., whether the Civil Rights Act is an exception to § 2283.

Petitioner asks that § 2283 be ignored or that a new exception be added thereto by "applying the judge-made rule of comity." (Petition, p. 16) However, this Court does not desire a conflict with state court proceedings. *Giles v. Maryland,* 35LW4181, 4185. *Donovan v. City of Dallas,* 377 U.S. 408, held (p. 412):

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. . . ."

Footnote 4 of *Wilson v. Schnettler,* 365 U.S. 381, 384, points out:

> "It is a doctrine of law too long established to require a citation of authorities, that . . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. *Peck v. Jenness,* supra, at 624-625."

As a matter of policy, this Court has always been reluctant to interfere with pending state court proceed-

ings: *Stefanelli v. Minard,* 342 U.S. 117; *Douglas v. City of Jeannette,* 319 U.S. 157. The questions of policy which were prevailing in *Greenwood v. Peacock,* 384 U.S. 808, 832-834, are equally applicable to this case. If, in every case in a state court between private citizens wherein a constitutional question is raised, the defendant would have the right to go to a federal court to enjoin the state proceedings, there would be a "phenomenal increase" in federal proceedings (p. 832); a trial may not be had until "months or years after the original charge was brought" (p. 833); and undoubtedly "many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased case load that would be produced" (p. 834). Surely, "the historic practice" of holding state trials in state courts even where constitutional questions are present has not been "such a failure that the relationship should now be revolutionized." (p. 834)

However, even if a federal court could intercede in state court proceedings, this case does not present a situation which requires such action or one in which this Court should grant the petition. The guidelines for intervention set forth in *Dombrowski v. Pfister,* 380 U.S. 479, and approved in *Cameron v. Johnson,* 381 U.S. 741, are: (1) the state action was not brought in good faith (evidenced in the *Dombrowski* case by a pattern of repeated arrests and threatened prosecutions), or (2) the statute was unconstitutional on its face. Neither of these criteria is present. In fact, both the district court and circuit court held that even under *Dombrowski,* the facts in this case did not warrant action by the federal courts.

Petitioner apparently believes the Pennsylvania court cannot properly adjudicate the constitutional questions; but this unsupported belief is no basis for federal intervention. *Dombrowski v. Pfister,* 380 U.S. 479, held (pp. 484-485):

> ". . . it is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will not usually amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

Petitioner assumes that even if the Pennsylvania court finds that his statements are false and defamatory, it cannot grant any relief such as prohibiting their republication. Unlike *Near v. Minnesota,* 283 U.S. 697, which involved a prior restraint on publication, the Pennsylvania action asks restraint only if the Court determines the statements are false and defamatory. There are numerous cases wherein the publication of false statements has been enjoined: *Federal Trade Commission v. Colgate-Palmolive Co.,* 380 U.S. 374; *Carpenters Union v. Ritter's Cafe,* 315 U.S. 722; *Murray Space Shoe Corp. v. Federal Trade Commission,* 304 F.2d 270 (2d Cir. 1962); *Betmar Hats v. Young America Hats,* 116 F.2d 956 (2d Cir. 1941); *Spahn v. Julian Messner, Inc.,* 18 N.Y. 2d 324, 221 N.E. 2d 543 (1966). If the publication of merely false statements can be enjoined, statements can enjoy no greater constitutional protection when, besides being false, they are also defamatory.

Likewise, a restraint on obscenity was upheld in *Kingsley Books, Inc. v Brown,* 354 U.S. 436. So, if the

publication of obscene material can be enjoined, then the false and defamatory should be subject to subsequent restraint because surely libelous statements do not enjoy any greater constitutional protection. In fact, they may enjoy less protection: *Linn v. Plant Guard Workers,* 383 U.S. 53, 63 (". . . malicious libel enjoys *no* constitutional protection in *any* context"); *Roth v. United States,* 354 U.S. 476; *Beauharnais v. Illionois,* 343 U.S. 250. Simply because petitioner's statements would be constitutionally protected if they are not libelous is no reason to forbid the Pennsylvania court to determine whether they are libelous. This is particularly true when the alleged constitutional issue is squarely before the Pennsylvania court.

Since the very constitutional issues raised by petitioner are pending in the Pennsylvania case, in which a decision is imminent, there is no need for this Court to grant the petition, particularly in view of 28 U.S.C. § 2283 and under the principles and policy that the federal courts should not enjoin state court proceedings.

B. PROVIDING A FORUM FOR A TRIAL OF A PRIVATE ACTION DOES NOT CONSTITUTE "STATE ACTION".

To date, all that Pennsylvania has done is to provide a forum wherein two of its citizens in a private lawsuit may have their rights adjudicated. This does not constitute "state action": *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944; *Skolnick v. Martin,* 317 F.2d 855 (7th Cir. 1963), cert. denied, 375 U.S. 908; *Skolnick v. Spolar,* 317 F.2d 857 (7th Cir. 1963), cert denied, 375 U.S. 904. To hold otherwise would mean that in every private lawsuit wherein constitutional questions are raised, a proceedings under

the Civil Rights Act could be instituted in federal court to enjoin the state court action. As pointed out above, such procedure is not only contrary to law but repudiates the long-established policy of non-intervention by federal courts in state court actions.

C. The queston whether the Civil Rights Act is an exception to 28 U.S.C. § 2283 is not present in this case.

Neither the District Court (10a-12a) nor the Circuit Court (Petition, p. 29) passed on the question whether the Civil Rights Act is an exception to 28 U.S.C. § 2283. Hence, this question is not before the Court. This Court has long refrained from passing on constitutional questions which were not decided by the court below.

D. The Pennsylvania action has not affected any of petitioner's constitutional rights.

Petitioner argues that the mere pendency of the state action is a burden upon the exercise of First Amendment rights (Petition, p. 21) and it has a "chilling effect" on these rights (Petition, p. 20). But petitioner admits that his book is still being sold, and that it has been sold continually, together with a new paperback edition, during the 28 months since the Pennsylvania action began. (39a) Hence, it has had no effect on his First Amendment rights. Both the district and circuit courts held that the Pennsylvania action had not affected petitioner's constitutional rights. Certainly, a mere request that if a court finds the utterances to be libelous, that further publication of them be enjoined, has less chilling effect than a suit for damages or a criminal prosecution for libel.

CONCLUSION

There is no evidence that petitioner's First Amendment rights have been invaded by the pendency of the Pennsylvania action. There has been no showing or reason to believe that the Pennsylvania court will disregard his rights under the First Amendment. There is no "state action" required by the Civil Rights Act. In the event that petitioner's ideas of constitutional law are not approved by the Pennsylvania trial or appellate courts, then he can appeal to this Court, which is the most obvious and traditional remedy for redress of wrongs by state courts: *Greenwood v. Peacock*, 384 U.S. 808, 828. For all of these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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